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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

GEORGE A. LEE, *Petitioner*,

vs.

WESTERN WOOL PROCESSORS, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OMER GRIFFIN
2020 First National Bank Building
Attorney for Petitioner

Other Counsel:

WILLIAM J. HEWITT
461 Hilton Office Building
Denver 2, Colorado

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in this cause.

Opinions Below

The opinion of the Court of Appeals has not been reported. A copy is appended as Appendix I.

Jurisdiction

The judgment of the Court of Appeals was entered December 31, 1962. The time for filing this petition was extended to and including April 22, 1963, by Order dated March 25, 1963.

Jurisdiction to issue the writ rests on Title 28, United States Code, § 1254.

Questions Presented

1. In affirming the judgment of a judge of the District Court overruling and reversing a prior Order of a Judge of the same court, has the Court of Appeals so far sanctioned a departure from the usual course of judicial administration as to require correction by this Court?

2. When one judge of the District Court reviewed and construed his own prior Order and ordered the payment of the amount of petitioner's judgment out of the Registry of the Court in conformity with such prior Order, is it error and an abuse of discretion for a judge of the same Court to overrule and reverse the action of his colleague judge when the facts and circumstances under which both judges were acting were identical and the first judge was available to reconsider his Order?

3. Did the Court of Appeals commit error in affirming the judgment of the District Court requiring the payment of the amount of Petitioner's judgment into the Registry of the Court?

Statutes Involved

There are no statutes involved in this petition.

Statement of the Case

Petitioner, appellant and plaintiff below, herein referred to as plaintiff, recovered judgment on a promissory note against the respondent, appellee and defendant below, herein referred to as defendant. In order to stay execution defendant deposited an amount equal to plaintiff's judgment into the court as security for the payment of the judgment pending trial of counterclaims. In conformity with the provisions of his own self-executing order one judge of the District Court ordered the payment of plaintiff's judgment from the registry of the court. Subsequently, and without an intervening change of facts or circumstances, another judge of the same court entered judgment against plaintiff for the repayment into court of a like amount as previously paid him by the court.

Plaintiff is petitioning for a Writ of Certiorari to review the order of the Circuit Court affirming the last judgment of the second District Judge.

On stipulation and motion for partial summary judgment the District Court entered judgment for plaintiff based on defendant's promissory note and stayed execution pending disposition of the counterclaims pleaded in the Answer of the defendant (R.29). Defendant persisted in asserting further and additional counterclaims which were not contained in his Answer (R. 69). After it became apparent that defendant was adopting tactics calculated to hinder and delay plaintiff in obtaining the amount concededly due him by buying up or otherwise acquiring claims to be asserted as counterclaims in the case (R. 69, 70) plaintiff applied for and obtained a vacation of the stay of execution (R. 3). Defendant refused to pay the judgment and it was necessary to levy execution on defendant's manufacturing plant (R. 64, 66, 67).

Plaintiff desisted from his execution proceedings in consideration of defendant's depositing the amount of the judgment with the court and the stipulation for entry of order of November 22, 1961 (R. 66, 67). The order provided that on failure of defendant to reimburse plaintiff or his attorneys for costs and expenses incurred in his execution proceedings within ten days of the receipt of a statement therefor, plaintiff was entitled to payment of the amount of his judgment and accrued interest. (R. 5, 6).

Such a statement was received on December 22, 1961 (R. 9). No payment of this statement was made, attempted or received within the ten days following. On January 3, 1962, the twelfth day after receipt of the statement, and in accordance with the provisions of the District Court Order, plaintiff made application to the Clerk for the payment of his judgment (R. 7, 8). The Clerk suggested by telephone to Judge William E. Doyle that a formal order should be prepared. Judge Doyle had very recently been assigned to the case and accepted the Clerk's suggestion. Plaintiff's attor-

ney then returned to his office to prepare the order. While the order was being prepared there was delivered in the mail (January 3, 1962) a personal check of defendant's attorney for the amount of the statement received the previous December 22nd. Upon return to the court plaintiff's attorney discovered that Judge Doyle had completed his business for the day and had departed. At the Clerk's suggestion plaintiff's attorney took the file, and defendant's check and the envelope it came in, together with the application and the order previously prepared, to Judge Chilson, the Judge who had previously been assigned the case. Judge Chilson examined his own order of November 22, 1961, the check and the envelope, and the order prepared by plaintiff's attorney; with all the facts before him, Judge Chilson construed his own order and decided that the plain terms of his order did not require the entry of an additional formal order for the payment of plaintiff's judgment. Judge Chilson then signed the check ordering the payment of plaintiff's judgment from the registry (R. 8).

Some two months later, defendant presented to Judge William E. Doyle a "Motion for Order Requiring Redeposit of Monies Withdrawn From the Office of the Clerk of the Court" (R. 9). After a hearing in which no additional or different facts were presented, Judge Doyle apparently taking a view of the matter different from Judge Chilson's, entered the Order which amounts to a judgment against plaintiff for the amount of his judgment (R. 19, 20). The nature of this Order as a final judgment is confirmed and established by subsequent measures requiring supersedeas bond as a condition of stay of execution and other measures to enforce payment of the money as required by the Order or Judgment.

There has been no trial or other disposition of any of defendant's counterclaims.

Basis for Federal Jurisdiction

Federal jurisdiction in the court of first instance is based upon the provisions of Title 28, United States Code, Annotated § 1332.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has sanctioned a departure from the usual course of judicial administration of such a nature as to require correction by this Court.

It has long been an established principal of judicial administration that when one district judge is available to hear a matter which he had previously considered and determined, and the facts and circumstances upon which the prior determination were made are the same, it is error and an abuse of discretion for a different judge of the same court to consider the matter, much less enter an order either consistent with or contrary to the prior order of his colleague. *Eg., United States vs. Wheeler*, 256 F. 2d 745 (3rd Cir. 1958), *certiorari denied*, 79 S. Ct. 111, 358 U. S. 873, 3 L. Ed. 2d 103, *rehearing denied*, 79 S. Ct. 229, 358 U. S. 873, 3 L. Ed. 2d 234, *certiorari denied*, 363 U.S. 828, 80 S. Ct. 1597, 4 L. Ed. 2d 1523 (1960); *TCF Film Corporation vs. Gourley*, 240 F. 2d 711 (3rd Cir. 1957); *Donnelly Garment Co. v. National Labor Relations Board*, 123 F. 2d 215 (8th Cir. 1942), *reversed on other grounds*, 67 S. Ct. 756, 330 U. S. 219, 91 L. Ed. 854; *Humphrey vs. Bankers Mortgage Company of Topeka, Kansas*, 79 F. 2d 345 (10th Cir. 1935); *Reynolds v. Iron Silver Min. Co.*, 33 F. 354 (Cir. Ct., D. Colo. 1888); *Williams v. Tidewater Associated Oil Company*, 125 F. Supp. 675, *reversed on other grounds*, 227 F. 2d 791, *certiorari denied* 76 S. Ct. 348, 350 U. S. 960, 100 L. Ed. 834 (1956). In affirming the judgment of the District Court, the Court of Appeals has sanctioned such a practice and has disregarded and refused to follow its previous holding in *Humphrey vs. Bankers Mortgage Company of Topeka, supra*. The opinion of Donnelly Garment Co. v. *National Labor Relations Board, supra*, contains the following language:

> "It is a long established rule that judges of the same court will not knowingly review, reverse or overrule each other's decisions. . . . The necessity of such a rule in the interest of an orderly administration of justice is clear."

United States vs. Wheeler, supra, admonished that judges of the same court should not place themselves in a position whereby in rendering "impartial judgment on a question they might be required to overrule the decision of a judge of the same court in the same case." The opinion states:

> "The crux of the matter, then, is not whether a second judge on reconsideration of a question can or should overrule the first judge but whether he may properly entertain the reconsideration at all. . . .
>
> . . . . the heart of the matter is whether a second judge may properly entertain the reconsideration at all. We have indicated that if the first judge is available the matter should again be presented to him. . . .
>
> . . . . the same testimony was nothing more that a review of Judge Miller's earlier decision and was an abuse of discretion. Such a review would under the circumstances have been an abuse even had the result been the same as Judge Miller's though the error would, of course, then have been harmless. And it would still under the circumstances have been an abuse of discretion even had the results reached by each judge on the merits been the opposite."

In support of the same proposition the Third Circuit opinion of *TCF Film Corporation vs. Gourley, supra*, states:

> "The petitioners base their claim . . . upon the rule that judges of coordinate jurisdiction setting in the same court and in the same case should not overrule the decisions of each other, a rule which this court followed in Jurgenson v. National Oil and Supply Company, 3rd Cir., 1933, 63 F. 2d 727, 729, and Price v. Greenway, 3rd Cir., 1948, 167 F. 2d 196, 199-200, and which has been applied in many other cases in this circuit as well as elsewhere. The respondents on the other hand contend that the rule, which is perhaps best exemplified by the opinion of the Court of Appeals for the Second Circuit in the case of Commercial Union of America v. Anglo-South American Bank, 1925, 10 F.

2d 937, has been deprived of its authoritative basis, by the recent decision of that court in Dictograph Products Company v. Sonotone Corporation, 1956, 230 F. 2d 131.

"It is true that the Dictograph case indicates that the rule under discussion is not absolute and all encompassing in its scope. There are, as the case illustrates, exceptional circumstances under which the courts have held that one judge of a district court may overrule a decision of this court in the same case. Nonetheless we think that the rule is a most salutary one. We adhere to it and hold that except under the most extraordinary circumstances it should be followed by the district judges of this circuit. The reasons for the rule have been reiterated in the many cases in which it has been applied and need not be repeated here in detail. It is sufficient to say that we regard it as a necessary rule of judicial comity, to preserve the orderly functioning of the judicial process.

"As we have said, there may be exceptional circumstances under which the rule is not to be applied. Such circumstances exist when the judge who made the original decision is not available to consider the application to rehear and reverse his decision. If the judge who made the decision dies or resigns from the court he obviously is no longer available to reconsider it and such reconsideration must perforce be by another judge if it is to be had at all. Likewise if the decision has been made by a judge temporarily assigned to the court for the hearing of a specified case and his assignment is terminated he is no longer available to entertain an application for rehearing and it must accordingly be considered by another judge."

Hardy vs. North Butte Mining Co., 22 F. 2d 62 (9th Cir. 1927) contains the following:

"The sole question presented for decision is this: If an order appointing receivers is made in a suit within the jurisdiction of the court making the order

> and in the exercise of judicial discretion, may another judge sitting in the same court, on the same record of his own motion or otherwise, vacate the order of appointment because, in his opinion, the order was mistakenly or improvidently made. On both principle and authority this question must be answered in the negative."

By January 3, 1962, the twelfth day after receipt by defendant's attorneys of the statement of plaintiff's costs, it was clear that defendant was in default of the condition expressed in the Order of November 22, 1961 and that plaintiff was entitled to the payment of his judgment. Assuming, arguendo, that the situation was not clear. Defendant's check together with the post marked envelope in which it was enclosed and the affidavits showing the date of receipt of the statement were presented to Judge Chilson on January 3, 1962. Judge Chilson read his own order, examined the check and envelope together with the affidavits attached to plaintiff's application and on these facts decided that the formal order for payment prepared by plaintiff's attorney was not necessary as his Order of November 22, 1961 was clear in that regard, and that all that was required to order payment was to sign the check prepared by the Clerk. Judge Chilson, with full knowledge of the undisputed facts, construed his own order and resolved any ambiguity that may have existed. This judicial act finally settled the matter and defendant's only proper course to obtain a modification or reversal of the Court's order was by way of appeal—not by shopping about for another judge to again present the matter. The Court of Appeals condoned this practice in affirming the judgment of the second judge to whom the matter was presented for reconsideration and in so doing has so far sanctioned the departure from the usual course of judicial administration as to require correction by this Court.

The Court of Appeals has rendered a decision in conflict with the decisions of other courts of appeals on the same matter.

The order for the payment of plaintiff's judgment from the registry of the Court was entered in the manner prescribed by the Order of November 22, 1961, i.e., by the signing of the check by the Clerk and the first judge. The Order of November 22, 1961 provides in part as follows:

> "7. Should the defendant fail to make any of the payments required by paragraph 4. . . . then on application of plaintiff and without necessity of notice to defendant or further order of court, the Clerk of the Court shall pay plaintiff or plaintiff's attorney of record so much of the security deposits . . . . as may be necessary to satisfy plaintiff's judgment in full. . . ."

The first judge had the same facts before him as were presented to the second judge and no others. As previously stated, the first judge specifically ruled that no formal order was necessary for the payment of plaintiff's judgment. The signing of the check was an order entered by the first judge after being fully apprised of the facts, and operated as an adjudication that plaintiff was in fact entitled to the payment of his judgment. This adjudication was reversed by the second judge and such procedure was approved by the Court of Appeals. The Third Circuit in *United States vs. Wheeler, supra*, and *TCF Film Corporation vs. Gourley, supra*, holds that such judicial action is error and an abuse of discretion as does the Eighth Circuit, *Donnelly Garment v. National Labor Relations Board, supra*. The Second Circuit, *Dictograph Products Company v. Sonotone Corporation*, 230 F. 2d 131 (2nd Cir. 1955) and the Ninth Circuit, *Castner v. First National Bank of Anchorage*, 278 F. 2d 376 (9th Cir. 1960); *Beedy v. Washington Water Power Co.*, 238 F. 2d 123 (9th Cir. 1956) are in conflict with the Third and Eighth Circuits. The Tenth Circuit, prior to its opinion in this case, had aligned itself with the Third and Eighth Circuits, *Humphrey vs. Bankers Mortgage Company of Topeka, Kansas, supra; Reynolds v. Iron Silver Min. Co.*, 33 F. 354, (Cir. Ct., D. Colo. 1888). It is necessary for this Court to settle those conflicts and

the orderly functioning of judicial administration dictates that this Court should resolve the conflicts by establishing the rule here advocated.

The Court of Appeals erred in affirming the judgment of the District Court requiring the payment of the amount of Plaintiff's judgment into the Registry of the Court.

The Order of November 22, 1961 is clear in its requirement that plaintiff's attorney must be in receipt of the reimbursement for costs expended in the execution proceedings, within ten days after receipt by defendant of a statement therefore; and in case of default, plaintiff was entitled to withdraw the amount of his judgment without further notice to defendant or further court order. The Order provides:

> "4. Within 10 days after receipt of statement from plaintiff's attorney, defendant shall reimburse plaintiff's attorney for all payments of court costs since date of judgment including clerk's fees, marshal's fees, sheriff's fees, recording fees and advertising, as shown by the statement."

and paragraph 7 of the order states:

> "Should defendant fail to make any of the payments required by paragraph 4 . . . . then on application of plaintiff and without necessity of notice to defendant or further order of court, the Clerk of the Court shall pay plaintiff or plaintiff's attorney of record so much of the security deposits mentioned in paragraph 6 as may be necessary to satisfy plaintiff's judgment in full. . ."

Receipt is what is emphasized in the order. Defendant's time to reimburse plaintiff did not start to run on the mailing of the statement, but only on receipt of the statement. Defendant was merely required to see to it that plaintiff's attorney received reimbursement within ten days.

The facts are undisputed. Defendant received the statement on December 22, 1961. The ten days within which to place plaintiff's attorneys in receipt of the money constituting reimbursement expired January 1, 1962. Assuming defendant had an extra day because of the January 1 holiday, receipt of the money was still required to be had not later than the eleventh day which was January 2. No such reimbursement having been received, plaintiff was clearly entitled to make application to the court and Judge Chilson was clearly right in ordering payment of plaintiff's judgment under the order of November 22, 1961.

The concern here is with the plain meaning of a clear Order of the District Court. Resort to fiction and analogies to the law of payment are not applicable nor warranted. The Court of Appeals erred when it approved of the findings of the second judge of the District Court as found in its opinion as follows:

> "In interpreting its own order the trial court (second judge) held that the payment was timely; that the usual course of dealings between the parties established the use of the mails for payment, and drew such inference from the facts that the lawyers were in different cities, the statement of costs had been mailed, and all other service and negotiations by the parties in connection with this lawsuit had been submitted by mail. Under the circumstances, we find no error of law and the finding of the trial court cannot be set aside as clearly erroneous . . ."

Assuming, arguendo, that the law of payment was applicable, there had been no prior dealings between the attorneys relating to the payment of debts or money. The cases dealing with the problem of payment by use of the mails all involve a debtor-creditor relationship, a situation that does not exist in this case, and hold that to constitute payment at the time of deposit in the mails, there must have been a series of payments using a check and the mails for delivery and acceptance of such method by the person entitled to receive the remittance. *Faut vs. Miller*, 218 S. W.

2d 901 (Tex. Civ. App. 1949); *Mackey vs. Dobrucki*, 116 Conn. 666, 166 Atl. 393 (1951); *Brandtjen & Kluge vs. Pope*, 28 Tenn. App. 679, 192 S. W. 2d 496 (1945). In *Faut vs. Miller, supra*, the following is found:

> "Ordinarily a check mailed on the last day for payment, not received on that day, is not a timely payment, unless there is established a custom of the debtor to pay in that way, or the creditor has led him to believe that the check will be received as cash."

In *Bloomer vs. Kirkman Corp.*, 38 Cal. 2d 480, 241 P2d 17 (1952), the creditor stated in a letter to the debtor that he can "send in the payment" and it was held that such a communication using itself the mails did not constitute an agreement or a course of conduct or consent that the remittance contemplated be made by mail, quoting 70 C. J. S., Payment, Section 7, page 218. The rule is reiterated in *Guardian Nat. Bank vs. Huntington County State Bank*, 206 Ind. 185, 187 N. E. 388 (1933).

Under the plain meaning of the Order of November 22, 1961, defendant was required, within ten days after receipt of the statement, to place plaintiff's attorney in receipt of the amount indicated in the statement. Defendant was at liberty to adopt any means of transmission he desired so long as reimbursement was received within the time prescribed, and this it failed to do. The interpretation of the second judge of the District Court of the Order of November 22, 1961 was clearly erroneous and the Court of Appeals was in error in affirming it.

CONCLUSIONS

The ruling of the Court of Appeals sanctions an intolerable departure from the usual course of judicial administration which requires correction by this Court. The Court of Appeals has rendered a decision in conflict with its own prior rulings and those of other circuits relating to same

important question of judicial administration which should be resolved by this Court. The Circuit Court committed error in affirming the erroneous judgment of the District Court interpreting an order that was devoid of ambiguity.

Respectfully submitted,

OMER GRIFFIN
2020 First National Bank Building
Attorney for Petitioner

Other Counsel:

WILLIAM J. HEWITT
461 Hilton Office Building
Denver 2, Colorado

APPENDIX I

United States Court of Appeals

TENTH CIRCUIT

No. 7004 — November Term, 1962

GEORGE A. LEE,
Appellant,

v.

WESTERN WOOL PROCESSORS, INC.,
Appellee.

Appeal from the United States District Court for the District of Colorado

(December 31, 1962)

William J. Hewitt (Dayton Denious was with him on the brief) for Appellant.

Robert B. Murray of Murray and Hecox for Appellee.

Before MURRAH, Chief Judge, and LEWIS and SETH, Circuit Judges.

LEWIS, Circuit Judge.

This action arose in the District Court for the District of Colorado as a claim by plaintiff-appellant upon a promissory note. Defendant-appellee did not question the alleged indebtedness on the note but pleaded the existence of counterclaims. Upon stipulation and motion for partial summary judgment, the court entered judgment for plaintiff in the amount of $17,262.50, staying execution pending determination of the counterclaims. As conditions of the

stay order defendant was required to deposit with the clerk of the court the sum of $18,271.69 and to make further deposits of interest payments from time to time. The order, dated November 22, 1961, also provided:

> "4. Within 10 days after receipt of statement from plaintiff's attorney, defendant shall reimburse plaintiff's attorney for all payments of court costs since date of judgment including clerk's fees, marshal's fees, sheriff's fees, recording fees and advertising, as shown by the statement."
>
> "7. Should defendant fail to make any of the payments required by paragraph 4. . . ., then on application of plaintiff and without necessity of notice to defendant or further order of court, the Clerk of the Court shall pay plaintiff or plaintiff's attorney of record so much of the security deposits . . . as may be necessary to satisfy plaintiff's judgment in full, and shall pay to defendant or defendant's attorney of record any remaining balance of such security."

On January 3, 1962, plaintiff's attorney, in an ex parte application and upon representation that defendant had not met the conditions of paragraph 4, obtained the full amount of the money on deposit with the clerk. The check representing the amount of the deposit was signed by the clerk and the judge who had entered tthe order conditionally staying execution.

Several weeks later defendant learned that the deposit of monies had been paid to plaintiff and immediately sought an order requiring the return of the monies to the registry upon claim that there had been no violation of the provisions of paragraph 4 of the stay order. The motion was heard by a judge other than the judge who had entered the stay order but to whom the case had been then regularly assigned. Defendant's motion was granted and an order entered requiring plaintiff to forthwith re-deposit with the clerk all monies withdrawn. This appeal is taken from such order and our initial consideration must be directed to the question, raised by motion to dismiss, of whether this court

is without jurisdiction to review the order in that it is not a final decision, 28 U.S.C.A. 1291, nor within the purview of interlocutory determinations permitted under 28 U.S.C.A. 1292.

Clearly the order appealed from has interlocutory aspects in its nature but plaintiff-appellant relies upon the liberal interpretation of the final judgment rule rendered by the United States Supreme Court in numerous cases, *Forgay v. Conrad* (1848) 6 How. 201, 12 L. Ed. 404; *Thomson v. Dean* (1868) 7 Wall. 342, 19 L. Ed. 94; *Radio Station WOW v. Johnson* (1945) 326 U. S. 120, 124, 65 S. Ct. 1475, 89 L. Ed. 2092; *Swift & Co. Packers v. Compania Colombiana Del Caribe* (1950) 339 U. S. 684, 70 S. Ct. 861, 94 L. Ed. 1206. Defendant-appellee counters with language from those cases and others which appears to exclude from their operation orders for the payment of money into court or trust to abide the final decision on the merits of the case and cites particularly *Louisiana Bank v. Whitney* (1887) 121 U. S. 284, 7 S. Ct. 897, 30 L. Ed. 961, wherein it is stated:

> ". . . The court has not adjudicated the rights of the parties concerned. It has only ordered the funds into the registry of the court for preservation during the pendency of the litigation as to its ownership. Such an order it has always been held is interlocutory only and not a final decree. . . . ." 121 U. S. at 285.

But the view that the present order falls in the general description of funds impounded by the court pending litigation is an oversimplification of the fact situation. Here, the parties entered an agreement to withhold execution of a judgment already obtained subject to certain conditions. The plaintiff-appellant, regarding the agreement as breached by by reason of the failure of the conditions, withdrew the funds in accordance with the remedy afforded by the stipulation. Defendant-appellee, contending that no breach had occurred, sought the ruling of the court. The order entered finalized the matter as to the interpretation of the agreement. It has no bearing upon the merits of appellant's judgment nor the validity of counterclaims. If

review is postponed until the entire case is ripe for appeal, the right claimed and resolved by the trial court will be a nullity. Thus, the order here involved falls within the rule of *Cohen v. Beneficial Industrial Loan Corp.* (1949) 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528:

"... But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to effect, or to be affected by, decision of the merits of this case.

"This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, right asserted in this action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. . . .

> "We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, . . . appealability would present a different question." 337 U. S. at 547.

We hold that under the totality of circumstances the subject order is appealable and the motion to dismiss is so denied.

We find, however, that plaintiff's dual appellate contentions that the trial court erred and was without jurisdiction to require re-deposit of the monies are without merit. The undisputed facts show that attorneys for de-

fendant received through the mail at their Colorado Springs office on December 22, 1961, the statement of costs mailed by plaintiff's attorneys from their Denver office. On January 2, 1962, defendant's attorneys mailed back their check for the full amount which was received by plaintiff's attorney's on January 3, 1962. Plaintiff's attorneys had at such time applied for but had not received the deposited monies. In interpreting its own order the trial court held that the payment was timely; that the usual course of dealings between the parties established the use of the mails for payment, and drew such inference from the facts that the lawyers were in different cities, the statement of costs had been mailed, and all other service and negotiations by the parties in connection with this lawsuit had been submitted by mail. Under the circumstances, we find no error of law and the finding of the trial court cannot be set aside as clearly erroneous, F.R.C.P. Rule 52; *Friedman v. Sealy, Inc.*, 10 Cir., 274 F. 2d 255; *Colby v Cities Service Oil Company*, 10 Cir., 254 F. 2d 665. Nor does the order requiring re-deposit constitute a prohibited reversal by one district judge of the order of another. The act of signing the check allowing withdrawal of the monies was not a formalized order and was not premised upon a determination of either law or fact. The order appealed from held only that a self-executing order of the court had been abused by plaintiff and such determination was made by the judge to whom the matter was regularly assigned. And, in fact, the motion was heard only after full understanding by both judges of the procedural complications involved.

The judgment is affirmed.